IN THE HIGH COURT OF JUDICATURE AT BOMBAY
ORDINARY ORIGINAL CIVIL JURISDICTION
NOTICE OF MOTION NO.2406 OF 2007
IN
SUIT NO.3148 OF 1995

Shri Loveleenkumar C. Merck ...Plaintiff
vs.
Smt.Sharda L.Merck & Anr. ...Defendants

Mr.Uday Warunjikar i/b M/s.Divekar & Co.for the Plaintiff
Mr.U.M.Mahajan for the Defendant No.1
Ms Hemani Jhariya for defendant No.2 in support of notice of motion.

CORAM: A.S.OKA,J.
DATE : AUGUST 24,2007

P.C.:

1. Heard the learned counsel for the second defendant in support of the notice of motion and the learned counsel for the plaintiff who has opposed the notice of motion. The prayer in this notice of motion is for setting aside the order dated 28th November 2003 passed by this court. By the said order, this court directed that the suit will proceed ex-parte against the second defendant.

2. The learned counsel for the second defendant has invited my attention to various averments made in the affidavit in support. She pointed out that the second defendant had appointed Mr.Ajay Das, Advocate to represent him. She pointed out that the said Advocate represented to the second defendant that he was regularly attending to the matter. In fact, she stated that on the representation made by the said Advocate, a sum of Rs.6,000/- was paid by the second defendant as and by way of charges payable to the Court Commissioner. it is stated that the said Advocate provided a copy of order

allegedly passed on 11th September 2006 by this court. The learned counsel for the second defendant pointed out that after making enquiry, the second defendant found that no such order was passed in the suit. The learned counsel for the second defendant has tendered the written statement of the second defendant and submitted that the same may be accepted by condoning the delay.

3. The learned counsel for the plaintiff invited my attention to the affidavit in reply filed by the plaintiff to the notice of motion. He pointed out that after order dated 28th November 2003 was passed by this court, letters were sent by the plaintiff to the second Defendant on various dates mentioned in the paragraph 22 of the reply. He submitted that in spite of receiving the said letters, the second defendant has not chosen to take any action. He submitted that he has filed a complaint on 6th October 2006 before the Hon'ble the Chief Justice making a grievance about the fabricated order dated 11th September 2006. He stated that an enquiry is being conducted by the Registrar (Judicial-I) in that behalf. He stated that the second defendant did not co-operate and has failed to appear before the Registrar (Judicial-I). He submitted that since the allegations have been made against an Advocate, the said Advocate ought to have been impleaded as a party to the notice of motion. He submitted that the second defendant has purported to purchase the suit property during the pendency of the suit and this notice of motion is an attempt to delay the suit.

4. The learned counsel for the second defendant invited my attention to the averments made in rejoinder. She submitted that a case is made out for permitting the second defendant to file the written statement.

5. I have considered the submissions. In affidavit in support of the notice of motion, the second defendant has stated thus :

"4. I say that I had appointed an Advocate Mr.Ajay Das to represent me in the above matter. I was always informed by the said Advocate Ajay Das that he is attending the above matte regularly therefore I was rest assured that I am being represented in the above matter.

6. I say that I was further informed that a Commissioner has been appointed in the above matter for recording evidence. I say that the said Advocate Mr.Ajay Das also took an amount of Rs.6000/- from me as and by way of commission charges payable by me in the above matter. Hereto annexed and marked as Exhibit - 'B' is a copy of the letter dated 2nd May 2006 addressed by the said Advocate Mr.Ajay Das to Mr.Chaugule, the Commissioner appointed in the above matter. I was therefore convinced that I am being represented in the above matter.

7. I say that the said Advocate Mr.Ajay Das also gave me a copy of order dated 11th September 2006 passed by His Lordship S.B.Mhase. On perusal of the said order I found it to be very suspicious, therefore, I made enquiries with the Department, High court. on making enquiries as above I found that no order dated 11th September 2006 was passed in the above matter. I further learnt that vide an order dated 28th November 2003 His Lordship the Hon'ble Mr.Justice D.G.Deshpande was pleased to order that the above suit be proceeded ex-parte against me. Hereto annexed and marked as Exhibit 'C' and 'D' are copies of orders dated 11th September 2006 and 28th September 2003 respectively."

6. In affidavit in rejoinder, the second defendant has reiterated that he had appointed Mr.Ajay Das, Advocate to represent him. Reliance is placed on the order passed on 21st December 1999 in the Chamber Summons No.1572 of 1999. I have also perused the original order passed on 21st December 1999 on record. The said order shows that the Mr.Ajay Das appeared for the second defendant (who has been described in the said order as proposed defendant). Reliance is also placed on order dated 8th February 2000 passed by this court in the notice of motion No.348 of 2000 which shows that the said Mr.Ajay Das appeared for the second defendant. Therefore, there is some material on record to show that the second defendant had engaged Mr. Ajay Das as his Advocate. The

second defendant has placed reliance on a letter dated 9th October 2006 sent by him to the said Advocate Mr.Ajay Das and a postal acknowledgement thereof. A copy of the said letter is annexed to the rejoinder filed by the second defendant. In the said letter it is recorded that the said Advocate demanded a sum of Rs.6,000/- for making payment of charges to the Court Commissioner. It is also recorded that the said Advocate handed over a xerox copy of order dated 11th September 2006. It is stated that the second defendant acted upon the said order and made payment of Rs.6,000/- by a pay order drawn in favour of the Advocate for the plaintiff. It is stated in the said letter that the son of the second defendant contacted the Advocate for the plaintiff. He was shocked to learn that there was no such order passed on 11th September 2006 by this court. A copy of letter dated 13th April 2007 sent by the son of the second defendant to the Registrar (Judicial-I) has been annexed to the rejoinder in which the son of the second defendant has set out as to how he came in possession of the xerox copy of the alleged order dated 11th September 2006.

7. It must be stated here that the plaintiff had written letters to the second defendant informing him about the progress of the suit on various dates mentioned in paragraph 22 of the reply filed by the plaintiff.

8. The second defendant was under an impression that Shri Ajay Das, Advocate was representing him. As pointed out earlier, there is sufficient material on record to show that

the said Advocate was representing the second defendant.

9. The written statement of the second defendant is ready and the learned counsel for the second defendant has tendered the written statement. It is true that there is a long delay on the part of the second defendant in filing the written statement. In my view, a liberal approach is required to adopted by condoning the delay in filing the written statement subject to payment of heavy costs. The amount of costs is quantified at Rs.15,000/-. Considering the fact that the suit is of the year 1995, hearing of the suit is expedited.

10. Hence, notice of motion is made absolute in terms of prayer clauses (a) and (b) subject to the second defendant paying costs of Rs.15,000/- to the plaintiff within a period of two weeks from today. Written statement of the second defendant is taken on record. It is made clear that the payment of costs will be a condition precedent and if the second defendant fails to pay the costs within the stipulated period, the order dated 28th November 2003 will stand.

11. It is made clear that the enquiry which is conducted by the Registrar (Judicial-I) as regards the order dated 11th September 2006 will continue and the Registrar (Judicial-I) is free to record appropriate findings without being influenced by the order passed on this notice of motion. A copy of this order shall be forwarded to the Registrar (J-I).

12. The suit shall be set down for settlement of issues on 17th September 2007.

JUDGE